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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1756~~ 70-213

GROENDYKE TRANSPORT, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case wherein the court granted enforcement of the Board's Order.

## CITATIONS TO OPINIONS BELOW

The Board's decision and order are reported in 181 NLRB No. 99. See Appendix A, page A1. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 438 F. 2d 981 and is set out in Appendix B, p. A14. The judgment of the court is contained in Appendix C, p. A16. The order denying rehearing is contained in Appendix D, p. A17.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on March 15, 1971. Petitioner's petition for rehearing was denied on April 15, 1971. Petitioner's motion to stay the mandate pursuant to Rule 41 (b) of the F.R.A.P. was sustained granting petitioner 30 days to make application to this Court for a writ of certiorari or until May 28, 1971. The jurisdiction of this court is invoked under the provisions of Title 28 USCA Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board in this proceeding has utilized the Union's extent of organization to determine both a showing of interest and an appropriate unit in a representative hearing.
2. Whether a single terminal of an integrated transportation company constituted an appropriate unit for collective bargaining.
3. Whether the Board properly excluded dispatchers, mechanics and servicemen from the unit found to be appropriate.
4. Whether petitioner was entitled to a hearing on the issues raised by the pleadings filed in the unfair labor practice proceeding.

5. Whether the Board was authorized to invoke an unpublished rule and apply it to this proceeding.

6. Whether the trial examiner articulated the reasons for his findings and orders entered in this proceeding.

## STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions involved in these proceedings are as follows:

Title 29 USCA Sec. 159 (a), Appendix E, p. A18, Title 29 USCA Sec. 159 (c), Appendix F, p. A18, Title 29 USCA Sec. 159 (c)(B), Appendix G, p. A18, Title 29 USCA Sec. 160 (b), Appendix H, p. A19, of the National Labor Relations Act, 61 Stat. 136 (1947) as amended, and Title 5 USCA Sec. 552, Appendix I, p. A19, of the Administrative Procedure Act, 60 Stat. 238.

## STATEMENT OF CASE

1.

### The Representation Proceedings

On June 6, 1967, pursuant to §9(a) and (c) of the Act, the Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as the Union, filed with the Regional Director for the Sixteenth Region of the Board in Fort Worth, Texas, a petition for certification of representatives, alleging the existence of a question of representation with respect to a *regional unit* consisting of drivers and owner-drivers of the petitioner at petitioner's terminals, 15 in number, located in *Texas, Oklahoma and Louisiana.* (A-111) At the close of the hearing, the Union amended its petition requesting, in the alternative, separate units at each of such terminals. (A-285) The petitioner contended that only a system-wide unit was appropriate. (A-159)

*The Board found the proposed regional unit inappropriate as based on the extent of the Union's organization.* (A-12) It further found the factors favoring a system-wide unit not to be so compelling "as to require a finding that only a system-wide unit was appropriate". (A-12) The Board found the single terminal units in Texas, Oklahoma and Louisiana presumptively appropriate and directed elections in each terminal, *conditioned upon the Regional Director's making a finding in each instance that the Union had an adequate showing of interest at the particular terminal.* (A-15) Petitioner had initially moved to dismiss the Union's petitions but such motion was overruled without giving the Petitioner an opportunity to contest the Union's alleged showing of interest in the regional units originally claimed by the Union. (A-7) Over the objection of the petitioner, the Board excluded dispatchers, mechanics and servicemen from the unit. (A-13)

2.

**The Elections**

On August 29, 1968, and August 30, 1968, elections by secret ballot were conducted under the supervision of the Regional Director for the Board's Sixteenth Region, at the 10 separate terminals designated in the Board's Decision and Direction of Election. (A-14) The Regional Director concluded that the Union did not have an adequate showing of interest at 5 of the terminals included in the original 15 terminals claimed by the Union. (A-19)

A tally of the ballots cast revealed the following results (A-45-51):

| | For Union | For Company |
|---|---|---|
| Enid, Oklahoma | 3 | 20 |
| Ponca City, Oklahoma | 4 | 13 |
| Duncan, Oklahoma | 10 | 6 |
| Ardmore, Oklahoma | 17 | 3 |
| Wichita Falls, Texas | 6 | 2 |
| Gainesville, Texas | 0 | 3 |
| Houston, Texas | 12 | 24 |
| Irving (Dallas), Texas | 12 | 7 |
| Angleton, Texas | 10 | 9 |
| Baton Rouge, Louisiana | 0 | 5 |
| Total votes cast in regional unit | 74 | 92 |

The petitioner filed objections to the elections won by the Union at petitioner's terminals located in Duncan, Oklahoma, Ardmore, Oklahoma, Wichita Falls, Texas, Irving, Texas, and Angleton, Texas. Petitioner alleged that union representatives and supporters had electioneered during the election and the 24 hours preceding the election near the polling places. (A-36) In addition, the petitioner urged that the Board had erred in excluding dispatchers, mechanics, and maintenance men from the unit. (A-36) The petitioner further contended that the individual terminal units were inappropriate and were based on the Union's extent of organization. (A-36) The petitioner requested that the elections be set aside, the petitions dismissed, or in alternative, new elections be ordered, and additionally that a hearing be held on the employer's objections. (A-37)

The Regional Director issued his report on objections in which he recommended that the objection as to the five terminals named above be overruled without a hearing and the Union certified as collective bargaining representative in such units. (A-68) To this report, the employer filed timely exceptions. (A-76) Subsequently the Board cer-

tified the Union as the bargaining representative at the employer's terminals located at Duncan, Oklahoma; Ardmore, Oklahoma; Wichita Falls, Texas; Irving, Texas; and Angleton, Texas.

3.

**The Unfair Labor Practice Proceeding**

For the purpose of testing the Board's decisions and other orders entered in this proceeding, the employer refused to bargain with the Union. In due course an unfair labor practice charge was lodged against the petitioner. (A-87) The Board subsequently adopted as its order the recommended order of the trial examiner wherein the examiner had ruled that there were no unresolved matters requiring an evidential hearing and accordingly the Board's motion for judgment on the pleadings was granted. (A-118) As part of the aforesaid order the Board ordered petitioner to bargain collectively with all drivers, owner-drivers, regular part-time drivers, regular part-time owner-drivers, employed at those terminals where the Union won the election.

The petitioner then filed a petition for review of the foregoing order with the United States Court of Appeals for the Fifth Circuit.

Following the filing of briefs and oral argument the United States Court of Appeals in a per curiam decision entered judgment enforcing the Board's order.

**REASONS FOR GRANTING THE WRIT**

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the following Circuit Court decisions:

*NLRB* v. *Frisch's Big Boy Ill-Mar Inc.*, 256 F. 2d 895 (7 Cir. 1966)

*NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1 Cir. 1967), cert. denied, 389 U.S. 959, 88 S. Ct. 337

*NLRB* v. *Solis Theatre Corp.*, 403 F. 2d 381 (2 Cir. 1968)

*NLRB* v. *Harry T. Campbell Sons Corp.*, 407 F. 2d 969 (4 Cir. 1969)

In the foregoing decisions the courts could see "no rational basis for fractionating the respondent's organization for purposes of collective bargaining." *NLRB* v. *Purity Food Stores, Inc.*, supra.

## ARGUMENT AND AUTHORITIES

### Introduction

The Court of Appeals' per curiam decision announced in effect that all judges of the court hearing this cause were of one mind, and the case was so clear as to render a full discussion thereof unnecessary. 21 C.J.S., Courts, §217(a), p. 401. A per curiam opinion is ordinarily appropriate in cases involving—

> "- - - A review of questions of fact, questions that involve nothing more than the discretion of the trial court, or questions that involve the application of well settled rules of law, - - - it may be employed to dispose of cases in which numerous questions are raised and to discuss them would require a long opinion that would serve no useful purpose. - - - It may be employed to dispose of cases in which anything written on the points raised would add nothing to the law."
>
> *Newmons* v. *Lake Worth Drainage District*, 87 So. 2d 49 (Fla.)

The court has made in effect a summary disposition of this petition for review.

As to such dispositions this court has held:

> "The duty of the Court of Appeals - - - cannot ordinarily be discharged summarily."
>
> *Mario Mercado E. Hijos* v. *Commins*, 322 U.S. 465, 64 S.Ct. 1118

The court's per curiam opinion indicated that the case of *NLRB* v. *Groendyke Transport, Inc.*, 417 F. 2d 33 (C.A. 10), cert. denied, 90 S. Ct. 944, disposed of all issues raised in this case. At most, the foregoing decision stands for the proposition that terminal of the company, isolated geographically, can be found to be an appropriate unit on the basis of the record made in that case. Petitioner respectfully submits that the record in this case should be reviewed independently.

1.

**The Court of Appeals Has Approved the Board's Inconsistent Finding That a Regional Unit Was Inappropriate As Based on the Extent of the Union's Jurisdiction; Whereas Terminal Units Located in the Same Region Were Found to Be Appropriate.**

It will be noted that had the elections been held throughout the regional unit a tabulation of the votes would indicate that the employer would have won the election. Upon oral argument, the court did inquire of the Board as to its reason for refusing to hold elections throughout the regional unit. Petitioner submits that no valid reason was given for this determination. The stated reason was as follows:

> "The record, however, fails to establish a uniform pattern and practice of regional bargaining in this industry, and it is clear that the proposed unit possesses neither geographic nor administrative cohesiveness. Thus, the sole basis for the regional unit ap-

pears to be the extent of the Petitioner's jurisdiction, a factor to which the Board does not give effect in determining what constitutes an appropriate unit." (A-11, 12)

The Board's decision did not state its reasons for finding that a single terminal unit was not subject to the same infirmity. Neither did the Board discuss what weight, if any, it gave to the factor of the extent of organization.

"The Board majority in this case did not discuss what weight, if any, it gave to the factor of extent of union organization.

- - -

"In short, the union naturally wants units in which it can win elections - - -."

*Metropolitan Life Insurance Co.* v. *NLRB*, 327 F. 2d 906 (1 Cir. 1964), 380 U.S. 438, 85 S. Ct. 1061, 13 L.Ed. 2d 951 (1965)

2.

**The Board Was Guilty of an Abuse of Discretion in Determining That a Single Terminal in an Integrated Transportation Company Was an Appropriate Bargaining Unit.**

The Court of Appeals relied principally, if not solely, on the case of *NLRB* v. *Groendyke Transport, Inc.*, 417 F. 2d 33, cert. denied, 90 S. Ct. 944. The court in that case upheld the Board's findings to the effect that:

"The single terminal unit avoids the wide geographic separation existing in the 1951 proceeding, the Denver terminal does not experience frequent interchange of employees with other terminals, there is no system-wide scale for wages, and the Denver terminal manager has substantial authority in matters of daily concern to the drivers."

The employer submits that the foregoing decision can be distinguished on the basis of the factual findings and the applicable law.

In the foregoing decision, the Board noted in its order on remand that:

> "The Denver drivers bargained for and obtained a wage readjustment applicable only to drivers based in Colorado. The record shows that as far as the Denver drivers are concerned, the Respondent's business does not require the frequent interchange of employees with other terminals. (Appendix p. 17)."

No similar factual finding was made in this case.

The Court of Appeals for the Tenth Circuit did not rule on the effect of piecemeal unionization nor the effect of the terminal manager's lack of authority to resolve issues which would be the subject of collective bargaining.

In contrast, the Court of Appeals for the First Circuit has held:

> "We can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining. - - -
>
> "There should be some - - - consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of *piecemeal unionization.*"
>
> 79 Harvard L. Rev. 811
>
> *NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir. 1967), cert. denied, 389 U.S. 959, 88 S. Ct. 337

The Court of Appeals for the Seventh Circuit agreed with the Court of Appeals for the First Circuit, stating:

"It is obvious that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining."

*NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7 Cir. 1966)

The Court of Appeals for the Second Circuit has also examined an integrated business operation and concluded:

"In large part, the Board based its unit determination on the role of the local manager of the Freeman Theatre, but the evidence shows that his authority is limited to little more than overseeing the daily activities of the employees. For example, he disciplines and reprimands employees, initially interviews job applicants, although the final decisions on hiring and firing are made by Interboro, and prepares and submits vacation schedules for approval by Interboro. It appears, therefore, that instead of being in a decision making position, the 'manager' has little or no authority on labor policy but is subject to detailed instructions from the central office."

*NLRB* v. *Solis Theatre Corporation*, 403 F. 2d 381 (2 Cir. 1968)

See also *NLRB* v. *Harry T. Campbell Sons Corp.*, 407 F. 2d 969 (4 Cir. 1969)

It cannot be seriously argued that respondent's terminal manager has any authority to resolve issues relating to the foregoing subjects of collective bargaining. All authority over these subjects is retained by the respondent's central office at Enid, Oklahoma. At most, respondent's terminal manager has been assigned various ministerial duties in carrying out the labor policies established by respondent's central office.

The court has only to examine a typical Teamster contract to determine the chaotic effect of piecemeal union organization on this employer. For example, in the se-

niority section provisions can be found for permitting an employee to exercise his seniority at terminals other than his home terminal. Thus, where only one terminal was unionized, a union employee would have the privilege of displacing a non-union employee at a non-union terminal. Such contracts further contain dispatch provisions which are based on seniority. A typical provision states that drivers from foreign terminals shall be dispatched ahead of home domiciled drivers only in the general direction of their home terminal. The result would be utter confusion in that the respondent's present terminals do not employ seniority provisions in its dispatch procedure.

The Board's order made no reference to the effect of piecemeal unionization on this employer. Certainly this is a factor which at least should be given some consideration. *NLRB* v. *Purity Food Stores, Inc.*, supra.

3.

**The Board Improperly Excluded Dispatchers, Mechanics, and Servicemen from the Unit Found to Be Appropriate.**

A.

**Dispatchers**

The Board in this proceeding found that "the dispatchers responsibly direct the work of the drivers, and we exclude them from the unit." (A-13) This finding was apparently based on the conclusion that the dispatchers were supervisors. The Act defines supervisors as follows:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward or discipline other employees, or *responsibility to direct them*, or to adjust their griev-

ances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, *but requires the* use of independent judgment."

Title 29 U.S.C. §152(11)

It will be noted that the dispatchers did not have authority to discharge, suspend or recommend discipline. At most the dispatchers had authority to assign work but not to exercise the prerogatives of management that required the use of independent judgment. The record will indicate that the terminal manager had general supervision over the dispatchers. In a similar case it was held:

"Whatever powers cab companies' switchboard operators had, to direct cab drivers or to call them in off the job, were of merely routine nature, not requiring use of independent judgment, and did not come within powers set forth in statutory definition of 'supervisor' - - -."

*NLRB* v. *City Yellow Cab Company,* 344 F. 2d 575 (6 Cir. 1965)

Cited with approval in *NLRB* v. *Security Guard Service, Inc.,* 384 F. 2d 143 (5 Cir. 1967)

At most the dispatchers in this case performed their duties in a ministerial capacity carrying out the orders of the central office.

"- - - mere responsibility of making work assignments in a routine fashion does not make an employee a supervisor."

*Precision Fabricators, Inc.* v. *NLRB,* 204 F. 2d 567 (2 Cir. 1953)

*NLRB* v. *Southern Airways Company,* 290 F. 2d 519 (5 Cir. 1961)

B.

**Mechanics and Servicemen**

Prior to the decision rendered in *E. H. Koester Bakery Co., Inc.*, 136 NLRB No. 100, the Board had a policy of including truck drivers in a more comprehensive bargaining unit comprising, for example, mechanics, production and maintenance workers. In *E. H. Koester*, the Board announced a change of policy as follows:

> "If, - - - truck drivers are shown to have such a diversity of interests from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them."

In a strong dissenting opinion, it was noted—

> "We disagree with so much of the decision herein as does not include the truck drivers and garage mechanics in the unit which is being established. - - - to say that they share no interests with other employees is to ignore the facts in the record and the realities of industrial life.
>
> * * *
>
> "- - - *what the majority are doing here, in effect is to make the inclusion or exclusion of these employees turn on the desires of the petitioner.*"
>
> (Dissenting Opinion)
>
> *E. H. Koester Bakery Co., Inc.*, supra.

The dissenters in *E. H. Koester Bakery Co., Inc.*, appear to have accurately forecast the Board's handling this problem in future cases. In *NLRB* v. *Cumberland Farms, Inc.*, 370 F. 2d 54 (1 Cir. 1966), the union petitioned for a designation of a bargaining unit to include all production and maintenance workers at the employer's Canton

plant, including truck drivers. The Board proceeded to find the following unit to be appropriate:

> "All production and maintenance employees at the employer's Canton, Massachusetts plant, *including truck drivers, mechanics, and loaders* but excluding office clerical employees, laboratory technicians, farm laborers, construction workers, professional employees, guards and supervisors as defined in the Act."

The Court of Appeals disagreed with this finding and remanded the case to the Board "for articulation of valid reasons if indeed there are any, for including truck drivers in the more comprehensive unit."

The employer submits that the Board has given no articulated reason for exclusion of dispatchers and mechanics from the units found to be appropriate.

4.

**The Employer Was Entitled to a Hearing on the Issues Raised by the Pleadings in the Unfair Labor Practice Proceeding.**

The Board has adopted a policy to the effect that—

> "It is established Board policy in the absence of newly discovered or previously unavailable evidence not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been litigated in a prior related representation proceeding."
>
> *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 379 F. 2d 517 (7 Cir. 1967), cert. denied, 389 U.S. 1041, 88 S. Ct. 780, ..... L.Ed. 2d .....

This policy has been implemented by the Board's use of the summary judgment procedure in unfair labor practice proceedings. This procedure has been questioned in *NLRB* v. *Clement-Blythe Companies*, 415 F. 2d 78 (4 Cir.

1969) and *Pepsi-Cola Buffalo Btlg. Co.* v. *NLRB*, 409 F. 2d 676 (2 Cir. 1969). In the latter case it was held:

> "- - - the use of summary judgment in deciding whether an employer has committed an unfair labor practice does not exempt the Board from complying with the Administrative Procedure Act (5 U.S.C §557(c)) which require that:
>
> "All decisions including initial, recommended and tentative decisions are a part of the record and shall include a statement of - - -
>
> "(A) findings and conclusions and the reasons or basis therefor on all material issues of fact, law, or discretion presented on the record - - -.
>
> "We do require, however, *that in granting a motion for summary judgment the Board explain why the facts found at the representation hearing sustain the complaint of an unfair labor practice.*"
>
> *NLRB* v. *Clement-Blythe Companies*, supra

The Board in this case merely affirmed the rulings made by the trial examiner in the unfair labor practice proceeding without making an independent adjudication. (A-34)

5.

**The Board Was Not Authorized to Invoke an Unpublished Rule and Apply It to This Proceeding.**

The Board's order entered in the unfair labor practice proceeding reads in part as follows:

> "A. For the purpose of determining the duration of the certification of the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union - - -." Citing *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785. (A-122)

The above "rule" was formulated in the course of the foregoing adjudicatory proceeding and thereafter applied to subsequent proceedings. This court recently examined in detail the Board's practice in making such rules without publishing them in the Federal Register as required by the Administrative Procedure Act, Tit. 5 U.S.C.A. §552, et seq. The court held:

> "The rule making provisions of the Administrative Procedure Act may not be avoided by the process of making rules in course of adjudicatory proceeding."
>
> *NLRB* v. *Wyman-Gordon Company*, 394 U.S. 759, 89 S. Ct. 1246, 22 L.Ed. 2d 676 (1969)

While *Wyman-Gordon* holds that the Board can draft an "order" within its statutory authority to apply to a particular case, no such valid order was issued satisfying the requirements of *Metropolitan Life Insurance Company*, 380 U.S. 438, 85 S. Ct. 1061, 13 L.Ed. 2d 951.

6.

**Neither the Trial Examiner nor the Board Has Articulated the Reasons for the Order Entered in the Unfair Labor Practice Proceeding.**

As previously indicated, the Board adopted the findings of the trial examiner in toto without making an independent adjudication. The trial examiner stated in his findings:

> "The union requested a regional unit consisting of drivers and owner-drivers of the Respondent at the terminals (15 in number) located in Texas, Oklahoma and Louisiana, or in the alternative separate units at each of such terminals." (A-111)

This finding is contrary to the union's initial petition which requested:

> "All truck drivers and shop employees employed by the employer at its Oklahoma terminals." (A-158) (And a separate petition for some designated employees for Texas, A-158)

The union made no request in its petitions for a unit of employees located in Louisiana. The union made a belated motion to amend its petition at the close of the hearing to cover separate terminal units of employees located in Oklahoma, Texas and Louisiana. In response to this request, the hearing officer made the following ruling:

> "There is no need for a motion to amend the petition in light of the positions taken on the appropriateness of any unit as requested by any of the parties - - -" (A-285)

The trial examiner adopted the Board's finding in the representation case that the proposed regional unit was inappropriate as based on the extent of union organization. Neither the Board nor the trial examiner gave any reasons why the single terminal units in Oklahoma, Texas and Louisiana were not also based on the extent of union organization. (A-111)

> "When the Board so exercises the discretion given to it by Congress, it must disclose the basis of its order."
>
> *Metropolitan Life Insurance Company* v. *NLRB*, supra

## CONCLUSION

Petitioner respectfully prays that this court scrutinize the record in this proceeding and grant the employer's petition herein for a writ of certiorari.

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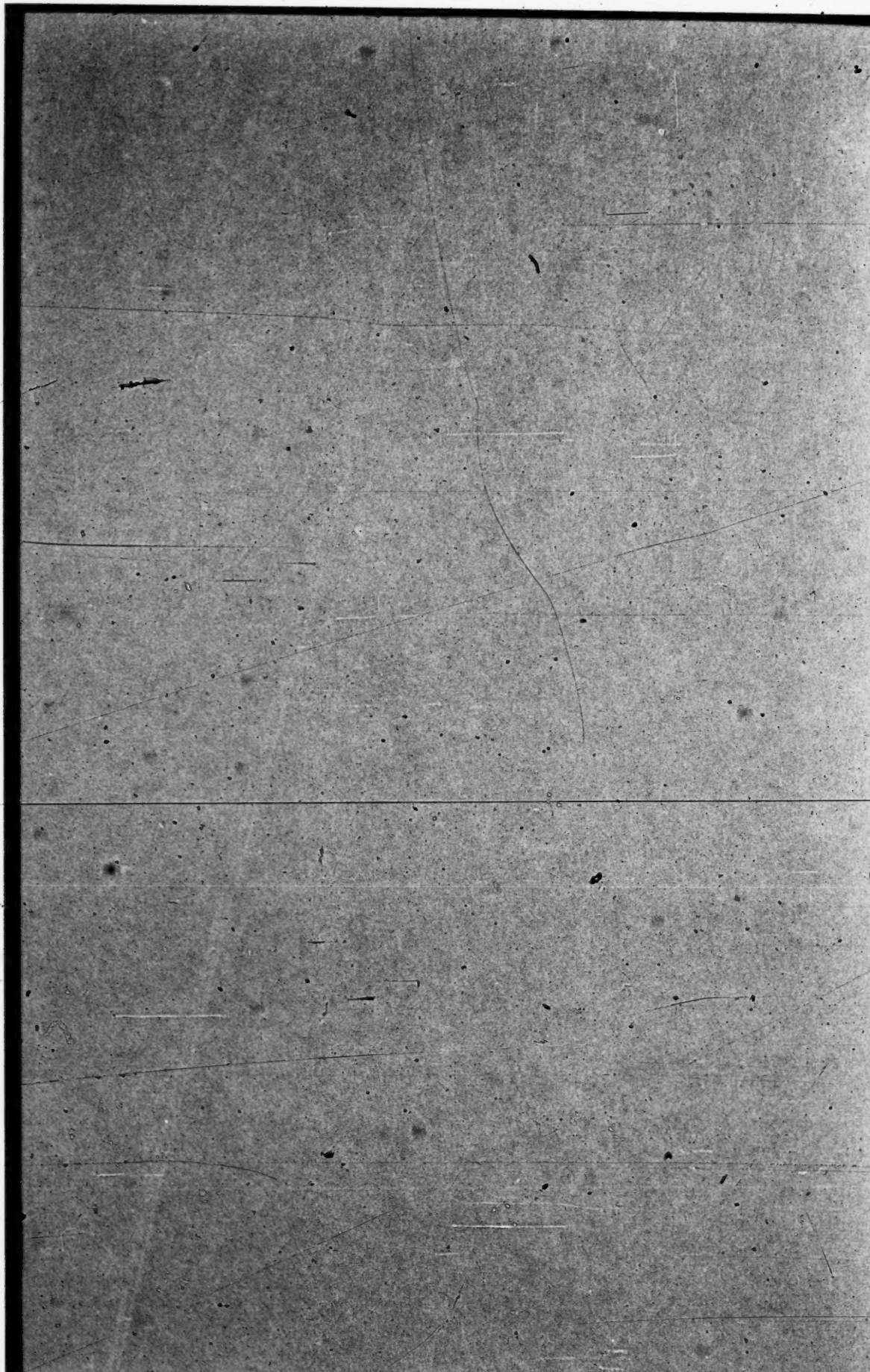

# APPENDIX A

## Trial Examiner's Decision

(Number and Title Omitted)

STATEMENT OF THE CASE

The Representation Proceeding[1]

On or about June 6, 1967, Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Union, filed petitions under Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) in Cases No. 16-RC-4660 and 16-RC-4661 concerning the representation of employees of Groendyke Transport, Inc., the Respondent. The Respondent operates 26 trucking terminals in 6 states: Colorado, New Mexico, Kansas, Oklahoma, Texas and Louisiana.

The cases were consolidated and a hearing held. The Union requested a regional unit consisting of drivers and owner drivers of the Respondent at the terminals (15 in number) located in Texas, Oklahoma and Louisiana, or in the alternative separate units at each of such terminals. The Respondent contended that only a system-wide unit was appropriate.

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1. Official notice is taken of the record in the representation proceeding Case No. 16-RC-4660 and 16-RC-4661 as the term "record" is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as amended). See LTV Electrosystems, Inc., 166 NLRB No. 81, enf'd 388 F. 2d 683 (C.A. 4, 1968); Golden Age Beverage Co., 167 NLRB No. 24, enf'd F. 2d (C.A. 5, 1969), 71 LRRM 2924; Intertype Co. v. Penello, 269 F. Supp. 573 (D.C. Va. 1967); Intertype Co. v. N.L.R.B., 401 F. 2d 41 (C.A. 4, 1968); Follett Corp., et al., 164 NLRB No. 47, enf'd 397 F. 2d 91 (C.A. 7, 1968); Section 9(d) of the National Labor Relations Act.

On or about June 5, 1968, the Board issued a Decision and Direction of Elections.[2] The Board found the proposed regional unit inappropriate as based on the extent of the Union's organization. It further found the factors favoring a system-wide unit not to be so compelling as to require a finding that only that unit was appropriate. The Board found the single terminal units in Texas, Oklahoma and Louisiana presumptively appropriate and directed elections in them conditioned upon the Regional Director's making a finding in each instance that the Union had an adequate showing of interest at the particular terminal. Inter alia, over objection by the Respondent, the Board excluded dispatchers, mechanics and servicemen from the unit—the dispatchers because they responsibly directed the work of the drivers, the others because their skills and interests were substantially different from those of the drivers.

Pursuant to the Decision and Direction of Elections, elections by secret ballot were conducted by the Regional Director on or about August 29 and 30, 1968, among the employees in the appropriate units to determine the questions concerning representation. Upon conclusion of the balloting, the parties were furnished tallies of ballots. The elections at only 5 of the terminals are material here. Those terminals and the results of the balloting at them are as follows:

Duncan, Oklahoma—Out of approximately 16 eligible voters, 16 ballots were cast, ten for the Union, and six against the Union. There were no challenged or void ballots.

Ardmore, Oklahoma—Out of approximately 23 eligible voters, 21 ballots were cast, 17 for and 3 against the Union. There was one challenged ballot and no void ballots.

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2. Groendyke Transport, Inc., 171 NLRB No. 143.

Wichita Falls, Texas—Out of approximately eight eligible voters, eight ballots were cast, six for and two against the Union. There were no void or challenged ballots.

Irving, Texas—Out of approximately 19 eligible voters, 19 ballots were cast, 12 for and 7 against the Union. There were no challenged or void ballots.

Angleton, Texas—Out of approximately 19 eligible voters, 19 ballots were cast, 10 for and nine against the Union. There were no challenged or void ballots.

On September 5, 1968, the Respondent filed objections to the above elections in which it alleged, variously, that union representatives and supporters had electioneered during the elections and the 24 hours preceding them, or near the polling places. In addition the Respondent urged that the Board had erred in excluding dispatchers, mechanics and maintenance men from the unit. The Respondent further contended that the individual terminal units were inappropriate and were based on the Union's extent of organization. The Respondent requested that the elections be set aside, the petitions dismissed, or in the alternative new elections directed, and additionally that a hearing be held on the Respondent's objections.

On October 16, 1968, the Regional Director issued his Report on Objections in which he recommended, to the extent material here, that the objections as to 5 named terminals be overruled and the Union certified as collective bargaining representative in such units. To this Report the Respondent filed timely exceptions.

On February 24, 1969, the Board issued its Decision, Certification of Representatives, Order and Direction of Second Elections in which the Board, so far as material here, adopted the Regional Director's recommendations

and certified the Union as the bargaining representative at the five terminals here involved.[3]

## THE UNFAIR LABOR PRACTICE CASE

On August 5, 1969, the Union filed the unfair labor practice charge involved in the instant case, in which it alleged that the Respondent has refused to bargain collectively with the Union.

On August 12, 1969, the General Counsel, by the Regional Director for Region 16, issued a Complaint and Notice of Hearing alleging that Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. In due course, on March 3, 1969, the Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied.

In its Answer, the Respondent admits the following allegations of the complaint: (1) filing and service of the charge, (2) certain jurisdictional facts, (3) that the Union is a labor organization within the meaning of Section 2(5) of the Act, (4) that the above described elections were held, and that the Board certified the Union as the representative in the 5 terminals here involved; and (5) that the Respondent refused to bargain with the Union "for the reason that the Board's certification . . . is in error." Respondent denied allegations in the complaint to the effect that (1) Respondent's attorney is its agent within the meaning of Section 2(13) of the Act, as alleged in paragraph 6 of the Complaint, (2) the units are appropriate, and (3) that the Respondent is engaging in un-

3. The Board said that the Respondent's exceptions, . . . raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations.

fair labor practices affecting commerce within the meaning of the Act.

Respondent affirmatively asserts in its answer that (1) union representatives engaged in electioneering to small groups within 24 hours of the election in violation of Board rules and decisions, (2) that union representatives, as part of the Union's election campaign, gave things of value to Respondent's employees so as to influence their vote, (3) that union representatives made material misrepresentations of fact shortly before the election which could not be answered by Respondent prior to the election and (4) the units found appropriate were in fact inappropriate, and based on the extent of the Union organization, and (5) that the Board erred in excluding dispatchers, mechanics and maintenance men from the units.

Under date of August 22, 1969, counsel for the General Counsel filed a Motion to Strike Portions of Respondent's Answer to Complaint and Motion for Judgment on the Pleadings in which he contends that the pleadings, considered together with the official Board record in the underlying representation proceeding (Cases No. 16-RC-4660 and 16-RC-4661) raise no issues requiring a hearing, that Respondent's defense set forth in its answer raises no litigable questions of fact and to the extent of the Motion to Strike is "sham" and "frivolous," and concluding that as a matter of law Respondent has no valid defense to the complaint.

Under date of August 26, 1969, I issued an Order to Show Cause on the General Counsel's motions. The Respondent has filed an Opposition to General Counsel's motions and a supporting brief. No other responses or briefs have been received.

## RULING ON MOTIONS TO STRIKE AND FOR JUDGMENT ON THE PLEADINGS

In its response and brief the Respondent opposes the Motion to Strike and for Judgment on the Pleadings. The Respondent's basic position is that it is entitled to a hearing on its objections. The Respondent further moves to strike paragraph 6 of the complaint to the effect that the Respondent's attorney is its agent. The Respondent further contends, citing *N.L.R.B.* v. *Ideal Laundry and Dry Cleaning*, 330 F. 2d 712 (C.A. 10, 1964), that in an unfair labor practice proceeding it is entitled as a matter of law to a hearing on its objections to the elections. Merit is found in the Respondent's motion to strike paragraph 6 of the Complaint. The Respondent's other contentions are not sustained.

In the light of the pleadings and the admissions of the Respondent the allegations of paragraph 6 of the Complaint are of no apparent relevance to the issues. The Respondent's motion to strike paragraph 6 is therefore granted.

It is established Board policy, in absence of newly discovered or previously unavailable evidence not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been litigated in a prior related representation proceeding.[4] This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter

4. Krieger-Ragsdale & Co., Inc., 159 NLRB 490, enf'd 379 F. 2d 517 (C.A. 7, 1967), cert. den. 389 U.S. 1041; N.L.R.B. v. Macomb Pottery, 376 F. 2d 450 (C.A. 7, 1967); Howard Johnson Company, 164 NLRB No. 121; Metropolitan Life Insurance Company, 163 NLRB No. 71. See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); NLRB Rules and Regulations, Section 102.67(f) and 102.69(c).

of right unless substantial and material issues are raised.[5] The Ideal Laundry and Dry Cleaning case is not authority to the contrary.

The Regional Director found that the Respondent's objections to the elections lacked merit, and the Board found that the Respondent's exceptions to that conclusion raised "no substantial or material issues of fact or law." At this stage of the proceedings those findings are the law of the case and binding on the Trial Examiner—though the Respondent is free to request the Board for reconsideration, and if the decision is adverse to seek review in the Court of Appeals.

Respondent does not present any newly discovered or previously unavailable evidence, nor does it claim to. The allegations in the Answer to the effect that Union representatives made material misrepresentations of fact and gave things of value to employees to influence their vote are belatedly raised. No explanation is given for their not having been previously stated. In such circumstances the Board's rules preclude consideration of those allegations (Section 102.67(f) and 102.69(c)).

There thus being no unresolved matters requiring an evidential hearing, the General Counsel's Motion for Judgment on the Pleadings is granted.

However, the General Counsel's Motion to Strike Portions of the Answer is denied. That motion is to strike the Respondent's answer to paragraphs 6, 7, 18 and 19 of the

5. O.K. Van and Storage, Inc., 127 NLRB 1537, enf'd 297 F. 2d 74 (C.A. 5, 1961). See Air Control Window Products, Inc., 355 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality." See also N.L.R.B. v. Bata Shoe Co., 377 F. 2d 821, 826 (C.A. 4, 1967) ". . . there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to determination of whether NLRB election results are to be accepted for purposes of certification."

complaint, and further paragraphs 7, 10, 11 and 12 of the answer. Except as to the answer to paragraph 6 of the complaint this motion is denied.

Paragraph 6 of the complaint has been stricken from the complaint. The answer to it is likewise stricken as no longer relevant.

Paragraph 7 of the complaint states the appropriate units involved, which the answer denies. Paragraphs 18 and 19 of the complaint allege that the Respondent's conduct constituted unfair labor practices within the meaning of Section 2(6) and (7) and 8(a) (1) and (5) of the Act. Paragraphs 7, 10, 11 and 12 of the answer reiterate objections raised by the Respondent in the representation proceeding and there disposed of. These are, respectively, (1) that union representatives engaged in electioneering within 24 hours of the election in violation of Board rules and decisions (paragraph 7); (2) that the election units are inappropriate (paragraph 10) and based on the extent of union organization (paragraph 11); and, (3) that the Board erred in excluding dispatchers, mechanics and maintenance men from the unit.

The issues raised by the Respondent in the portions of its answer referred to represent the Respondent's basic position, which it is entitled to pursue through the courts. Though in my view unsubstantiated they are nevertheless genuine issues which the Respondent is required to plead if it is to have any issue to contest. The motion to strike them is therefore without evident merit and is denied.

On the basis of the record I make the following further:

## FINDINGS AND CONCLUSIONS

### I. The Business of the Respondent

Groendyke Transport, Inc., the Respondent, at all times material herein has been and is a corporation duly organized under and existing by virtue of the laws of the State of Oklahoma, having its principal offices in Enid, Oklahoma. The Respondent has been continuously engaged as a motor common carrier in the transportation of petroleum and petroleum products.

During the past year, which period is representative of all times material herein, the Respondent, in the course and conduct of its business operations, furnished transportation between its terminals; the gross value of such services exceeded $500,000 of which services valued in excess of $50,000 were rendered to customers outside the State of Oklahoma. Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. The Labor Organization Involved

The Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

### III. The Unfair Labor Practices

All drivers, owner-drivers, regular part-time drivers, regular part-time owner-drivers, employed at each of the Respondent's terminals located in Duncan, Oklahoma, Ardmore, Oklahoma, Wichita Falls, Texas, Irving, Texas and Angleton, Texas but excluding all terminal managers, dispatchers, mechanics, servicemen, office clericals, casual part-time drivers, casual part-time owner-drivers, all other employees, guards and supervisors as defined in the Act,

constitute separate appropriate units within the meaning of Section 9(b) of the Act.

At all times since February 24, 1969, the Union has been the certified representative for the purpose of collective bargaining of the employees in the said units, and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of the employees in the said units for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

It is admitted and found that the Respondent refuses to bargain with the Union.

By thus refusing to bargaining collectively with the Union the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized exclusive bargaining representative in the appropriate unit.[6]

6. The purpose of this provision is to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See Mar-Jac Poultry Co., Inc., 136 NLRB 785; Commerce Co. d/b/a Lamar Hotel, 140 NLRB 226, 229, 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965).

B. Groendyke Transport, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the following appropriate bargaining units:

> All drivers, owner-drivers, regular part-time drivers, regular part-time owner-drivers, employed at each of Respondent's terminals located in Duncan and Ardmore, Oklahoma and in Wichita Falls, Irving and Angleton, Texas, but excluding all terminal managers, dispatchers, mechanics, servicemen, office clericals, casual part-time drivers, casual part-time owner-drivers, all other employees, guards and supervisors as defined in the Act.

b) Interfering with the efforts of said Union to negotiate for or represent employees as such exclusive collective bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the appropriate units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in signed agreements any understandings reached.

(b) Post at its office and place of business at the above said terminals, copies of the notice attached hereto

marked "Appendix".[7] Copies of said notice, on forms to be furnished by the Regional Director for Region 16, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from receipt of this recommended Order what steps the Respondent has taken to comply herewith.[8]

Dated at Washington, D. C.

September 26, 1969.

(Signed) Charles W. Schneider
Charles W. Schneider
Trial Examiner

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7. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

8. In the event these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 16, in writing, within 10 days from receipt of this Order what steps the Respondent has taken to comply herewith."

## DECISION AND ORDER

(Number and Title Omitted)

On September 26, 1969, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made in this proceeding and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this proceeding, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Groendyke Transport, Inc., Enid, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. March 13, 1970.

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1. We note and correct an inadvertent error in the Trial Examiner's Decision where he lists March 3, 1969, as the date Respondent filed its answer to the complaint rather than the correct date of August 21, 1969.

## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**No. 29475**

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GROENDYKE TRANSPORT, INC.,
Petitioner-Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner.

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Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

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(February 19, 1971)

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Before JONES, BELL and SIMPSON,
Circuit Judges.

PER CURIAM: The Petitioner, Groendyke Transport, Inc., is a motor carrier doing business in all of the States of the United States except Alaska and Hawaii. It has a substantial number of terminals, some of which are situated in the States of Oklahoma, Texas and Louisiana. These States comprise the territorial jurisdiction of the intervenor, Southern Conference of Teamsters. The Union carried on an organizational campaign at the terminals within its jurisdiction. Over objections of Groendyke, it was held by a Regional Director that terminals of Groendyke were appropriate bargaining units for its drivers. Elections were held and some were won by the Union while

others were lost by the Union. The Board entered its order directing Groendyke to bargain with the Union in those terminals where the Union had won the elections. The Board charges Groendyke with violating §§ 8(a) (5) and (1) of the National Labor Relations Act and seeks enforcement of its order. Groendyke urges that the Board's decision and order sanction piecemeal unionism which, it insists, is not only unauthorized but is contrary to the purpose and spirit of the Act. Groendyke raises the same question before the Tenth Circuit in *National Labor Relations Board* v. *Groendyke Transport, Inc.*, 10th Cir. 1969, 417 F. 2d 33, cert. den. 397 U.S. 935, ..... S.Ct. ....., 25 L. Ed. 2d 116. Groendyke urges that the factual differences between the Tenth Circuit case and this case are such as require a different disposition here than was made in the cited case. Factual differences are present but are not such as to require a different result. We are in agreement with the Board's conclusion that the terminals are appropriate bargaining units.

Other less significant issues are raised by Groendyke, none of which requires the overturning of the Board's decision. Its findings are supported by substantial evidence on the record as a whole. Its conclusions are declaratory of the applicable legal principles.

The order of the Board will be ENFORCED.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GROENDYKE TRANSPORT, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 29,475

JUDGMENT

Before: Jones, Bell and Simpson, Circuit Judges.

THIS CAUSE was submitted upon the petition of the Groendyke Transport, Inc., to review and set aside a certain order of the National Labor Relations Board issued on March 13, 1970, and upon cross-application of the Board to enforce said order. The Court heard argument of respective counsel on January 18, 1971, and has considered the briefs and transcript filed in this cause. On February 19, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Groendyke Transport, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: March 15, 1971

**APPENDIX D**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**No. 29475**

---

GROENDYKE TRANSPORT, INC.,
Petitioner-Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner.

---

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
(Texas Case)

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 19, 1971, 5 Cir., 1971, ..... F.2d .....)

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(April 15, 1971)

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Before JONES, BELL and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

## APPENDIX E

TITLE 29, U.S.C.A. §159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . ."

## APPENDIX F

TITLE 29, U.S.C.A. §159(c):

"(1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board. . ."

## APPENDIX G

TITLE 29, U.S.C.A. §159(c)(B):

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

## APPENDIX H

TITLE 29, U.S.C.A. §160(b):

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, . . ."

## APPENDIX I

TITLE 5, U.S.C.A. §552:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public. . .

* * *

"(C) rules of procedure, description of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency, and

"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

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JUN 26 1971
E. ROBERT SEAVER, CLERK

70-213

In the

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1750

GROENDYKE TRANSPORT, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD

*and*

SOUTHERN CONFERENCE OF TEAMSTERS,

*Respondents*

## SOUTHERN CONFERENCE OF TEAMSTERS' BRIEF IN OPPOSITION

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41

In the

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1756

GROENDYKE TRANSPORT, INC.,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD

*and*

SOUTHERN CONFERENCE OF TEAMSTERS,
*Respondents*

## SOUTHERN CONFERENCE OF TEAMSTERS' BRIEF IN OPPOSITION

### OPINIONS BELOW

The Decision and Order of the National Labor Relations Board appears at 181 NLRB #99 (See Pet. App.,[1] pp A-1 to A-13).

The Fifth Circuit's *per curiam* opinion enforcing the NLRB order is reported at 438 F. 2d 981 (See Pet. App. pp A-14-15).

### JURISDICTION

We acknowledge jurisdiction under 28 U.S.C. §1254(1).

[1] "Pet. App." refers to the Appendix to the Petition for Certiorari.

## QUESTIONS PRESENTED

1.

Whether there is substantial evidence to support the NLRB finding that petitioner-employer failed to bargain collectively with respondent union as the representative of employees in appropriate bargaining units as required by §8(a)(5) of the Act. 29 U.S.C. §158(a)(5).

2.

Whether on the facts found by NLRB single terminal units are appropriate for purposes of collective bargaining.

## STATUTE INVOLVED

Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. §158(a)(5) and 158(d) define the duty to bargain, viz:

> "It shall be an unfair labor practice for an employer—. . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). . . .
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and

conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

Section 9(a) and (b), 29 U.S.C. §159(a) and (b)

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, . . ."

## STATEMENT OF THE CASE

Petitioner (herein "employer") admittedly has refused to bargain with Respondent Union as representative of employees in specified terminal bargaining units.

The asserted basis for the refusal to bargain is

the employer's contention that terminal bargaining units are inappropriate for purposes of collective bargaining.

The circuit court's brief *per curiam* opinion noted:

> "The Board entered its order directing Groendyke to bargain with the union in those terminals where the Union had won the elections. The Board charges Groendyke with violating §§8(a)(5) and (1) of the National Labor Relations Act and seeks enforcement of its order. Groendyke urges that the Board's decision and order sanction piecemeal unionism which, it insists, is not only unauthorized but is contrary to the purpose and spirit of the Act. Groendyke raises the same question before the Tenth Circuit in *National Labor Relations Board v. Groendyke Transport, Inc.*, 10th Cir. 1969, 417 F. 2d 33, cert. den. 397 U.S. 935, ..... S.Ct. ....., 25 L. Ed. 2d 116. Groendyke urges that the factual differences bewteen the Tenth Circuit case and this case are such as require a different disposition here than was made in the cited case. Factual differences are present but are not such as to require a different result. We are in agreement with the Board's conclusion that the terminals are appropriate bargaining units.
>
> Other less significant issues are raised by Groendyke, none of which requires the overturning of the Board's decision. Its findings are supported by substantial evidence on the record as a whole. Its conclusions are declaratory of the applicable legal principles.
>
> The order of the Board will be ENFORCED."

## REASON FOR DENIAL OF CERTIORARI

**1.**

Petitioner attempts to present fact issues for determination here. Fact determinations are for NLRB in the first instance, with review by the circuit court as to whether the findings of fact are based upon substantial evidence. *Heinz Co. v. NLRB,* 311 U.S. 514; *NLRB v. Pittsburg S.S. Co.,* 340 U.S. 498; *NLRB v. Walton,* 369 U.S. 404. Accordingly, petitioner's attempt to present evidentiary issues to the Supreme Court will not do.

**2.**

The same issue has been tendered by the same employer and certiorari has recently been denied. *Groendyke Transport, Inc. v. NLRB,* 397 U.S. 935 (1970), denying review of the Tenth Circuit's decision at 417 F. 2d 33, enforcing 164 NLRB 231 (1967).

**3.**

It is the Board's, not the Court's function to determine appropriate bargaining units. *Packard Motor Car Co. v. NLRB,* 320 U.S. 486, 491; *Southern S.S. Co. v. NLRB,* 316 U.S. 311; *Pittsburgh Plate Glass v. NLRB,* 313 U.S. 146.

**4.**

This petition for certiorari is frivolous — its obvious purpose is to delay further the bargaining which the statute requires. The initial proceed-

ings for NLRB election herein were begun in June, 1967. Four years of immunity from bargaining is enough!

WHEREFORE, respondent prays that certiorari be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

---

No. 1756

GROENDYKE TRANSPORT, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 438 F. 2d 981. The Board's decision in the unfair labor practice proceeding (Pet. App. A) is reported at 181 NLRB No. 99. Its decision in the related representation proceeding is reported at 171 NLRB No. 193 (A. 8-16).[1]

---

[1] "A." refers to the Appendix to the briefs in the court below.

## JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 15, 1971, and a petition for rehearing was denied on April 15, 1971 (Pet. App. D). The petition for a writ of certiorari was filed on May 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board abused its discretion to determine appropriate bargaining units by establishing separate units for each of the company's trucking terminals and by excluding dispatchers, mechanics, and servicemen from those units.

2. Whether the procedures followed by the Board were proper.

## STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A18-19. Also relevant is:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

## STATEMENT

### A. The Representation Proceeding

Groendyke Transport, Inc. ("the Company") operates a truck freight line in 48 States and the District of Columbia. The home office is in Enid, Oklahoma, and the Company maintains 26 terminals in Colorado, Kansas, New Mexico, Louisiana, Texas, and Oklahoma (Pet. App. A1; A. 10). In June 1967, the Southern Conference of Teamsters ("the Union") filed representation petitions with the Board's Regional Director, seeking to represent units consisting of drivers and owner-drivers at the Company's terminals in Texas, Oklahoma, and Louisiana (A. 5-6).[2] At the representation hearing, the Union requested a regional unit, or alternatively state-wide units or separate units for each terminal (A. 188-191, 235-236). The Company contended that only a system-wide unit would be appropriate (Pet. App. A1).

With respect to the unit issue, the evidence showed the following: The Company operates a central dispatch system at its home office in Enid. The central dispatch initially allocates business among the terminals (A. 168-169). Drivers who are away from their home terminals are required to call central dispatch for assignments (A. 10). Records regarding all Company employees are maintained at Enid, and all upper level management personnel operate from that office (A. 169-170, 176-177).

---

[2] The Union added a newly-opened terminal in Louisiana at the Board hearing (A. 9-10, n. 3; 250-251).

The terminals are autonomous in several respects. After the initial assignment, the terminal deals directly with the customer's needs. The terminals may handle both intrastate and interstate shipments and may ship goods to any state in which the Company is licensed to operate (A. 10; 184, 203-204, 255-256). A manager at each terminal is responsible only to the home office, and travels to Enid with his fellow managers once or twice a year "so that the officials of the Company can find out what is going on" (A. 10; 186, 196). Terminal managers hire employees on a provisional basis, subject to final verification of credentials by the Enid office; promulgate and enforce local work rules, which vary from terminal to terminal; reprimand employees for rules infractions; and, in certain situations, discharge employees (A. 11; 196-198, 210-213, 220-225). They are also responsible for settling grievances at the local level. Although employees may appeal the manager's decision to the Enid Office, they seldom do (A. 11; 223-227).

The Company's terminals are widely scattered geographically (A. 10). Wages differ among the terminals, reflecting such conditions as local Company shipping rates and area competition for personnel with similar skills (A. 11; 166-167, 198-202, 210, 215-216, 256, 263-264). Separate wage adjustments have been made at individual terminals (A. 11; 228-229). There is little employee transfer between terminals; during the 3½ year period immediately preceding the hearing, about seven employees were trans-

ferred from terminals in Texas and Oklahoma to terminals outside those areas (A. 11; 205).

Dispatchers at each terminal receive orders directly from customers and from central dispatch in Enid (A. 13; 194). The terminal dispatcher then schedules the orders for delivery, assigning drivers and equipment according to the priorities he establishes (A. 13; 195-196, 203-204). Most drivers do not have regular customers and are continually assigned by the terminal dispatcher (A. 13; 203-205). He may also reprimand drivers for tardiness (A. 13). The Company does not have a local dispatcher at each terminal, and in those instances the terminal manager does most of the dispatching (A. 187). Driver vacations must be approved by either the dispatcher or the terminal manager (A. 207). Dispatchers, like terminal managers, meet at the Enid office once or twice a year (A. 10; 186).

On this evidence, the Board denied the Union's request for a regional unit or state-wide units. Those units, the Board concluded, had "neither geographic nor administrative cohesiveness" and appeared to be solely based on the extent of the Union's jurisdiction (A. 11-12). It further found that certain factors supported the Company's request for a system-wide unit (A. 12). However, other factors were present: the Company's individual terminals are widely scattered geographically; they are the Company's only operational subdivision; they operate with considerable local autonomy; and they are subject to differing wage arrangements and a minimal number of employee transfers. The Board concluded that, in

these circumstances, single terminal units were also appropriate for bargaining purposes. Accordingly, it granted the Union's alternative request for a separate unit at each of the Company's 15 terminals in Texas, Oklahoma and Louisiana (A. 12). The Board instructed the Regional Director not to conduct an election in any terminal unit until the Union made a sufficient showing of interest in that terminal (A. 12, n. 6).

The Board held that each unit should consist only of drivers and owner-drivers. Over Company objection, it excluded dispatchers because they responsibly directed the work of the drivers, and mechanics and servicemen because they possessed skills and interests substantially different from those of the drivers (A. 13).[3]

The Union won the elections conducted at five of the terminals and lost those conducted at the others (Pet. App. A2-3; A. 51-52). The Company filed ob-

---

[3] Mechanics at each terminal are required to have a commercial driver's license as a condition of employment and to drive on occasion. When a mechanic is required to drive, he receives extra pay. Drivers are sometimes required to perform shop work (A. 242-243, 264). They are not to perform any tune-up work on the engines of the Company vehicles, however, because "[t]his is a job for the mechanics" (A. 433-No. 29). In general, the Company "operate[s] [its] shops separately from the Transport operation * * * [j]ust like a commercial garage," with each repair job billed separately (A. 178, 209).

Shop employees other than mechanics ("servicemen") perform such functions as cleaning, washing and greasing trucks, changing oil and refueling, assisting mechanics, and other general shop duties (A. 13; 240-242, 244, 247-251).

jections, reasserting its earlier contention that single-terminal units were inappropriate and that dispatchers, mechanics, and servicemen should not have been excluded (A. 36-44).

After an administrative investigation, the Regional Director recommended that the Company's objections be overruled and that the Union be certified as the exclusive bargaining representative of the employees in the units involved (A. 44-69). The Board overruled the Company's exceptions (Pet. App. A3; A. 76-79) and certified the Union (Pet. App. A3-4; A. 84-85).

### B. The Unfair Labor Practice Proceeding

When the Company subsequently refused to bargain, the Union asserted that its action violated Section 8(a)(5) and (1) of the Act (Pet. App. A4; A. 87-94). In the ensuing unfair labor practice proceeding, the Company contended that the Board's certifications were invalid because of the single terminal unit determination and the dispatcher, mechanic, and servicemen exclusions. The Company further alleged that Union representatives had made material misrepresentations of fact and had given items of value to employees to influence their votes (Pet. App. A4-5; A. 95-97).

The Trial Examiner upheld the prior certifications on the basis of the pleadings alone. In accordance with usual Board practice, he treated the previous unit determinations as final, in the absence of newly discovered or previously unavailable evidence or special circumstances (Pet. App. A6-7). Since the Com-

pany offered no explanation for its failure to raise earlier the new contention respecting the Union's alleged misconduct in the campaign (Pet. App. A. 7), it was rejected. The Examiner concluded that the Company refused to bargain with the Union in violation of Section 8(a)(5) and (1). The Board agreed and ordered the Company, *inter alia*, to bargain with the Union on request (Pet. App. A13, 10-12). In a *per curiam* opinion, the court of appeals enforced the Board's order (Pet. App. A14-15).

## ARGUMENT

1. Section 9(b) of the Act empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." In this case, the Board determined that single-terminal units of only drivers and owner-drivers were appropriate for the Company's employees. That conclusion necessarily turns on the particular facts presented. The Board's decision was well within its broad discretion on this issue and was sustained by the court below; this essentially factual question does not warrant further review.[4]

[4] Petitioner's challenge to the Board's unit determination here is essentially the same as its unsuccessful challenge to the similar unit determination which the Board made regarding its Denver terminal. See *National Labor Relations Board* v. *Groendyke Transport*, 417 F. 2d 33 (C.A. 10), certiorari denied, 397 U.S. 935.

At all events, the Board's resolution of the issue was correct. The terminals are widely scattered geographically. Only a few employees were transferred among the terminals in three and a half years. Wages vary from terminal to terminal, and separate wage adjustments have been made for individual terminals. The terminal managers, who are directly responsible to the home office, exercise a considerable amount of autonomy in handling day-to-day operations—they establish work rules, discipline employees, and settle grievances. These factors justify fully the Board's finding that single-terminal units are appropriate, despite petitioner's contrary contentions (Pet. 8-12).[5]

Similarly, the Board correctly excluded the dispatchers, mechanics, and servicemen from the units. The Board, on ample evidence, rejected petitioner's contention (Pet. 12-13) that the dispatchers do not responsibly direct the work of the drivers. Petitioner's challenge to the status of the mechanics and

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[5] *National Labor Relations Board* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (C.A. 1), certiorari denied, 389 U.S. 959; *National Labor Relations Board* v. *Frisch's Big Boy. Ill-Mar, Inc.*, 356 F. 2d 895 (C.A. 7); and *National Labor Relations Board* v. *Solis Theatre Corp.*, 403 F. 2d 381 (C.A. 2), relied on by the Company (Pet. 10-11), are distinguishable. Those cases involved the propriety of single store and similar units within a geographically cohesive chain, in which the courts found no real local autonomy or a frequent interchange of employees. *National Labor Relations Board* v. *Harry T. Campbell Sons' Corp.*, 407 F. 2d 969 (C.A. 4) (Pet. 11), is also inapposite. The court there disapproved carving out a small group of employees from a single large, highly integrated operation.

servicemen (Pet. 14-15) was also properly denied by the Board, on the basis of substantial evidence showing that their skills and interests are different from the drivers.

2. The Company's procedural contentions (Pet. 15-18) are without substance. The claim that it was entitled to a plenary hearing in the unfair labor practice proceeding, in reliance on the *Pepsi-Cola Bottling Co.* case (Pet. 15-16), overlooks that this Court recently rejected the same contention in *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137. The Board's application to this case of the principle formulated in *Mar-Jac Poultry Co.*, 136 NLRB 785,[6] without first holding a formal rule-making proceeding, does not violate *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, as petitioner suggests (Pet. 16-17). In *Wyman-Gordon*, the Court explicitly acknowledged that adjudicated cases properly "serve as vehicles for the formulation of agency policies" and "provide a guide to action that the agency may be expected to take in future cases" (394 U.S. at 765, 766). Finally, the fact that the Board did not articulate the basis for its order in the unfair labor practice proceeding (see Pet. 17-18) comports fully with the settled principle that the representation and unfair labor practice

[6] There, the Board held that, where an employer deprives a certified bargaining representative of the benefits of a substantial portion of the certification year by delaying the start of bargaining, he may be required to bargain with the union beyond expiration of that year in order to provide the union with a full 12 months in which to seek a contract. The Board ordered such an extension here (Pet. App. A10).

proceedings are really one, and hence a single determination of the representation issue, absent special circumstances not present here, is enough. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 161-162; see also *Magnesium Casting Co.* v. *National Labor Relations Board, supra.*

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1971.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

**No. ~~1756~~ 70-213**

GROENDYKE TRANSPORT, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR REHEARING ON COURT'S ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

## No. 1756

GROENDYKE TRANSPORT, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**PETITION FOR REHEARING ON COURT'S ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

Petitioner, pursuant to Rule 58(2) of this Court, respectfully prays that the Court reconsider its order entered on October 12, 1971, in the above captioned case denying a writ of certiorari. Petitioner submits that the Court has overlooked or misapprehended the extent of conflict among the Courts of Appeal on the issues raised in this case. In addition, if the decision of the Fifth Appeals Court prevails, a large wholly integrated nationally operating motor common carrier will be destroyed eliminating from the national economy hundreds of jobs. The Petitioner is not fighting unionism. It is only fighting fragmentized unionism under which a wholly integrated company like the Petitioner cannot possibly operate.

## REASONS FOR GRANTING PETITIONER'S PETITION FOR REHEARING

The decision of the United States Court of Appeals for the Fifth Circuit in this case is also in conflict with the recently reported decision of the Ninth Circuit in *Westward-Ho Hotel Co.* v. *NLRB*, 437 F. 2d 1110 (1971).

## STATEMENT OF POINTS OF LAW OVERLOOKED OR MISAPPREHENDED

Whether the reasons assigned by the Board for its actions in this case were adequate to explain its departure from established standards on grounds other than extent of union organization.

## ARGUMENT AND AUTHORITIES

In *Westward-Ho Hotel Co.* v. *NLRB*, supra, the Court of Appeals for the Ninth Circuit noted in its opinion that—

> "- - - the Board's action here seems to be a retrogression to *Botany Worsted Mills*, 27 NLRB 687 (1940), which appears from the legislative history of §9(c) (5) to have been the kind of unit determination Congress intended to preclude. The House Report on §9(c) (5) expressly criticized that decision as an example of a case in which 'the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate.' H.R.Rep. No. 245, 80th Cong., 1st Sess. 37 (1947). We find that *Botany Worsted Mills* on its facts so closely resembles the case now before us that respect for Congressional intent in the enactment of §9(c) (5) precludes enforcement of the Board's order here."

In *Botany Worsted Mills,* the Board's stated policy was to the effect that—

> "Even if under other circumstances, the wool sorters or trappers would not constitute the most effective bargaining unit, nevertheless, in the existing circumstances, *unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers.*" 27 NLRB at 690.

The Court in this case has approved a Board finding which in effect furthers the policy adopted in *Botany Worsted Mills.*

In contrast, the Third Circuit has adopted a strict construction of §9(c) (5) stating that non-organizational factors must be substantial enough to justify a finding of appropriateness without the help of the extent of organization.

> "The certified appropriate unit must be in and of itself appropriate, apart from the extent of employee organization."
>
> *NLRB* v. *The Western & Southern Life Insurance Co.*, 3 Cir., 391 F. 2d 119, cert. denied 393 U.S. 978, 89 S.Ct. 445, 21 L.Ed.2d 439 (1968).

This Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2d 951, has made it clear that unit determinations are not to be lightly regarded.

> "Unit determination accordingly has important consequences on the character of bargaining structures, work assignment disputes between unions, and the relative power of labor and management. . . ."
>
> B. Meltzer, *Labor Law*, 290 (1970).

The Court, in *Westward-Ho Hotel Co.* v. *NLRB*, supra, relied to some extent on *Local 1325 Retail Clerk's Int'l.*

*Assn. AFL-CIO* v. *NLRB*, 414 F. 2d 1194 (1969). In this decision the Court stated:

> "Thus, a single store unit, if requested, will be approved unless it is shown that a single store *lacks meaningful identity as a self-contained economic unit.*"

The Board's order entered in this case made no finding that petitioner's terminals were self-contained economic units. And, as a matter of undisputed evidence, they are not.

As a result of fragmentizing the employer's operations for the purpose of collective bargaining, the employer will be faced with a "whipsaw" effect within its own organization.

> "Such 'whipsawing' can be detrimental not only to management and union negotiations but can multiply the chances of cessation or diminution of business operations to the damage of the - - - public." (Dissenting Opinion)
>
> *NLRB* v. *Winnebago Television Corp.*, 440 F. 2d 369 (1971).

The employer in this case is a motor common carrier with a paramount duty to serve the public under the stringent regulations of the Interstate Commerce Commission. The imposition of a duty to simultaneously negotiate *five* separate labor contracts not only places a catastrophic burden upon the employer but ultimately will affect the service rendered to the public and the rates the customers will have to pay.

## CONCLUSION

Petitioner respectfully requests the Court to reconsider its order of denial of a writ of certiorari by resubmitting this case to a court consisting of nine members.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

The undersigned counsel, one of the counsel of record for petitioner, certifies that the foregoing Petition for Rehearing is presented in good faith, not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court of the United States.

.....

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